No. 141

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1905.

Supreme Court U.S.
FILED
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JAMES H. McKENNEY, Clerk

THE EAST CENTRAL EUREKA MINING COMPANY (A CORPORATION), JAMES TOMAN, AND ELIZA A. TOMAN,

Plaintiffs in Error,

vs.

CENTRAL EUREKA MINING COMPANY (A CORPORATION),

Defendant in Error.

141

Motion to Dismiss Writ of Error

CURTIS H. LINDLEY,
HENRY EICKHOFF,
Attorneys for Defendant in Error.

Filed _____ 1906.

JAMES H. McKENNEY, Clerk.

By _____ Deputy Clerk.

THE MURDOCK PRESS, 332 Clay Street, S. F.

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No. 447.

THE EAST CENTRAL EUREKA MINING COMPANY (A CORPORATION), JAMES TOMAN, AND ELIZA A. TOMAN,
Plaintiffs in Error,

vs.

CENTRAL EUREKA MINING COMPANY (A CORPORATION),
Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR.

Comes the defendant in error herein, by its counsel appearing in that behalf, and moves this Honorable Court to dismiss the writ of error in the above entitled cause on the ground that this Court has no jurisdiction.

CURTIS H. LINDLEY,
HENRY EICKHOFF,
Counsel for Defendant in Error.

To Mr. P. G. Galpin, attorney of record for plaintiffs in error in the above-entitled cause:—

You are hereby notified that the defendant in error in the above-named cause will, on the 19th day of March, A. D. 1906, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the Court the foregoing motion, and the brief thereon hereto attached.

CURTIS H. LINDLEY,
HENRY EICKHOFF,
Counsel for Defendant in Error.

Copy of the foregoing motion, notice, and printed argument in support of said motion, and receipt of printed copies of the same is acknowledged this 12th day of February, 1906.

PHILIP G. GALPIN,
Atty. for Plffs. in Error.

STATEMENT OF THE CASE.

This is an action brought by defendant in error to quiet title to the Summit Quartz Mine and Mining Claim and to a gold-bearing vein which has its apex within the surface boundaries of said mine and mining claim and which said vein on its downward course enters the adjoining land claimed by plaintiff in error and called the Toman Ranch.

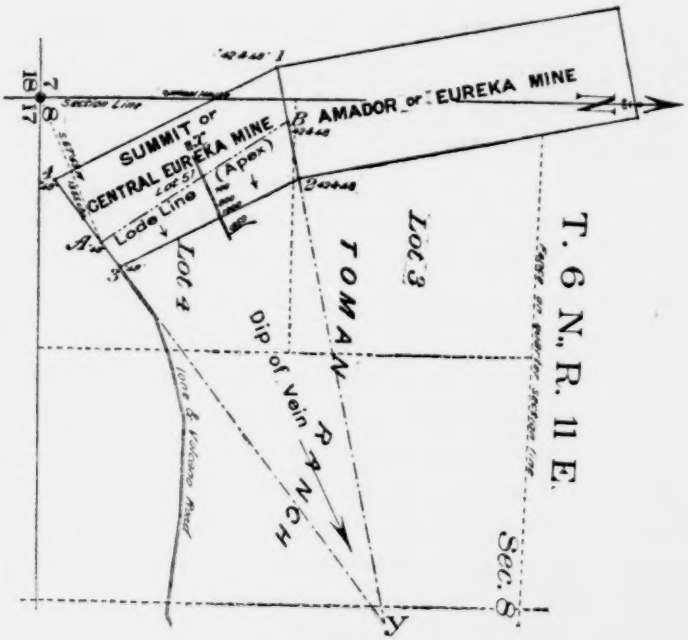

Figure 1.

The claim of defendant in error to the bodies in dispute rests upon a United States Patent to the Summit Mine, issued to Hall McAllister November 25, 1873, upon locations made in 1863 and 1865, and an application for patent filed in 1871. The instrument purports to grant the mining premises described with the exclusive right of possession and enjoyment of 1165 and 56-100 feet of the vein throughout its entire depth even though it might enter adjoining land; and recites that the proceedings were carried on in pursuance of the Act of 1866, the Act of 1870, and the Act of May 10, 1872, and that the patent was issued "in conformity with said acts."

Plaintiffs in error own the Toman Ranch, their title resting upon agricultural patents issued in 1876 and 1878, each containing reservation clauses as to veins or lodes apexing outside the surface boundaries granted.

Defendant in error, in its complaint, alleges ownership in fee of the Summit Quartz Mine; issuance of patent therefor; acquisition of patent rights by defendant in error through mesne conveyances, and the existence of the vein, its course and dip, as shown upon Figure 1.

Plaintiffs in error in their answer admit that patent issued to Hall McAllister for the Summit Quartz Mine, and that defendant in error has acquired all rights conferred thereby, but deny that said patent conveys any extralateral right. Deny that the Summit application was made February 7, 1871, or prior to October, 1872; deny that said application was based upon locations made in 1863 and 1865; deny that McAllister ever had any right to follow the Summit vein beyond the surface boundaries; deny that defendant in error ever acquired any right so to follow said vein; allege that plaintiffs in error own all veins beneath the Toman Ranch.

The decision of the trial court was in favor of defendant in error, plaintiff below.

Plaintiffs in error, defendants below, objected to the finding that the patent granted 1165 and 56-100 feet of the vein with the right to follow the same outside the surface boundaries, on the ground that the evidence was insufficient to sustain said finding, in that it showed that the end lines were not parallel and that the holder was limited to vertical planes drawn through the surface boundaries.

They objected to the finding that said patent issued in conformity with the Revised Statutes, Title 32, Chapter 6, in that the evidence showed that the same issued in pursuance of the Act of May 10, 1872.

The same objection of insufficiency of the evidence to support said findings was interposed to all other findings made.

The sole error of law assigned to the rulings of the trial court was to the action of that court in excluding a quitclaim deed from defendant in error to plaintiffs in error covering a part of the Toman Ranch adjoining the Summit Mine on the east.

The State Supreme Court affirmed the judgment and held:—

1. That the patent was issued on locations made prior to May 10, 1872, and on an application pending at that date, hence that the requirement as to the parallelism of end lines did not apply. That said patent issued pursuant to the act of 1872 because that Act was the only statute in force providing for the issuance of patent; but that it was governed by the provisions of the Act of 1866 as to surface boundaries and underground rights because the Act of 1872 in repealing the prior acts preserved all the rights which locators by virtue of their locations had initiated at the time of such repeal.

2. That the patentee by accepting patent under the Act of 1872, being the only act under which patent could issue, and receiving the additional rights given thereunder, did not renounce the right to follow the vein on its dip within converging end lines.

3. That the quitclaim deed offered by plaintiffs in error purported to convey no portion of the Summit Quartz Mine, hence was properly excluded by the trial court.

POINTS AND AUTHORITIES.

Section 709 of the Revised Statutes enumerates the three classes of cases in which the Supreme Court of the United States can issue writ of error to review the decision of a State court, as follows:—

1. "Where is drawn in question the validity of a treaty "or statute of, or authority exercised under, the United "States, and the decision is against the validity;" or

2. "Where is drawn in question the validity of a statute "of, or an authority exercised under any State, on the "ground of their being repugnant to the Constitution, "treaties or laws of the United States, and the decision is "in favor of their validity;" or

3. "Where any title, right, privilege or immunity is "claimed under the Constitution, or any treaty or statute, "or commission held or authority exercised under the "United States, and the decision is against the title, right, "privilege or immunity specially set up or claimed by "either party under such constitution, treaty, statute, com- "mission or authority."

It is apparent that neither party questioned the validity of any statute, treaty or authority, and that neither State court passed upon any such question. It follows, therefore, that the writ must be maintained, if it can be maintained, because of the denial by the State court of some right, title,

privilege or immunity of the class enumerated in division three, specially set up and claimed in that court by plaintiffs in error.

I.

THE RECORD SHOWS THAT PLAINTIFFS IN ERROR RAISED NO QUESTION OF THE CLASS SET FORTH IN DIVISION THREE OF SECTION 709.

There was involved a question which, had it been decided otherwise, would have made a review of the decision possible. Plaintiff below, defendant in error here, claimed a right and a title under the acts of Congress pursuant to which its patent to the Summit Quartz Mine was issued. It claimed a right under the Act of 1872 because at the time its patent was issued that was the sole act in existence under which patent could issue, and because that act in repealing the "Lode and Water Law" expressly preserved to prior locators all rights existing at the time of such repeal, and accorded such locators the right to complete to patent all proceedings pending before the land office at that time. It claimed rights under the Act of 1866 for the reason that the Summit locations were made and application for patent was presented to the Land Department under that Act. A denial of the right to follow the vein on its dip within the converging end lines would have rendered the decision reviewable at the instance of defendant in error.

It does not follow, however, that when the State court has confirmed the right claimed by defendant in error,

plaintiffs in error can, on the basis of that federal question, take the case up on writ of error. A decision favorable to defendant in error upon the right claimed by it must in the nature of things, be adverse to the claim of plaintiff in error to the property involved in suit. But it is only a decision against the right claimed under the Federal Statute that may be reviewed on writ of error and not a decision in favor of the right but against the contention of the opposing party. To bring himself within the provisions of the third decision of Section 709 the plaintiff in error must assert under a federal statute a right, title, privilege or immunity, personal to himself. Mere denial of such a right claimed below by defendant in error and decided below in favor of defendant in error, will not satisfy the statute.

In *Strader* v. *Baldwin*, 9 Howard, 261, the court said:—

"The plaintiffs in this case have set up no act of Con-
"gress in their pleadings, under which they support their
"claim or title to recover. It is the defendant who has
"pleaded a privilege or exemption under a statute of the
"United States and relies upon it as his only defense. If
"the decision of the State court had been against him, his
"right to have the case re-examined by this court could
"not be doubted. But the decision has been in favor of the
"right set up under the statute, the validity of which has
"been denied by the plaintiffs. We have no jurisdiction to
"entertain a writ of error to the Supreme Court of Ohio
"at their suggestion."

In *Missouri* v. *Andriano*, 138 U. S. 496, 499, Mr. Justice Brown for the court said:—

"Here is clearly a right or privilege claimed by respond-
"ent under a statute of the United States within the mean-

"ing of Revised Statutes, Section 709, and had the judg-"ment of the Supreme Court of Missouri been adverse to "his claim, there could be no doubt of his right to a writ "of error from this court, to review its ruling. It is in-"sisted, however, that the relator has no right to a review "of the ruling in favor of respondent, as he claimed no "right or privilege personal to himself or to his own status "as a citizen from such statute. The question thus pre-"sented is, whether the right or privilege must necessarily "be personal to the plaintiff in error, or whether he is not "entitled to a review where such right or privilege is "asserted by his opponent, and the decision is in favor of "such opponent and adverse to himself. While there is "some force in the argument that the right of review in "cases involving the construction of a federal statute "should be mutual, the act limits such right to cases where "the State court has decided against the title, right, privil-"ege or immunity set up or claimed under the statute."

In *Jersey City & Bergen Railroad* v. *Morgan*, 160 U. S. 288, 292, Mr. Chief Justice Fuller for the court said:—

"The claim which defendant now states it relied on is "that the coin in question was not legal tender under the "law of the United States. This, however, was only a "denial of the claim by plaintiff that the coin was such, "and as, upon the facts determined by the verdict, the "State courts so adjudged, the decision was in favor of and "not against the right thus claimed under the laws of the "United States, if such a right could be treated as involved "in this record, and this court has no jurisdiction to re-"view it."

And to the same effect:—

Linton v. *Stanton*, 12 How. 423;

Manning v. *French*, 133 U. S. 186, 191;

McNulta v. *Lochridge*, 141 U. S. 327, 330;

Texas & Pacific Railway v. *Johnson*, 151 U. S. 81, 98;

De Lamar's Nevada G. M. Co. v. *Nesbitt*, 177 U. S. 523, 528.

The record nowhere discloses any claim of right personal to plaintiffs in error asserted by them under any federal statute.

The denials contained in the answer are formal denials of the allegations of the complaint wherein defendant in error asserted rights under a federal patent issued under the sanction of federal law, and such denials, therefore, fall within the rulings above cited.

Plaintiffs in error allege in their answer "that the defendants are the owners and entitled to all veins, lodes and ledges beneath the surface of the lands and premises described in the complaint as the Toman Ranch," but they fail to connect that claim of ownership in any way with any federal conveyance or statute. A bald claim of title without relating the same in any way to a federal source certainly does not present the case of a right asserted under a federal law.

The bill of exceptions is equally barren of any matter going to show that the lower court denied plaintiffs in error any federal right or that they intended to present such a right to the State Supreme Court for decision on appeal. Plaintiffs in error specify eighteen particulars in which the evidence is insufficient to justify the decision, which specifications in detail refer to the findings of fact made by the trial court.

The first objection is directed to the finding that on November 25, 1873, the United States granted to Hall McAllister the land described in patent and 1165.56 linear feet of the Summit Quartz Mine, vein and all other veins apexing within such surface boundaries with the right to follow the same on their dip, on the ground of insufficiency of evidence, "in this that the evidence shows that the end lines "of the Summit Quartz Mine as patented to Hall McAl- "lister, were not parallel, and the evidence further shows "that the patentee under the patent to the Summit Quartz "Mine had no right to pursue any vein, lode, ledge or "deposit beyond the exterior boundary lines of said Sum- "mit Quartz Mine extended downward vertically." (Printed Transcript, page 76.)

Objection II follows:

"The evidence is insufficient to justify the finding "that by letters patent to the Summit Quartz Mine issued "to Hall McAllister, there was granted to him the rights "to pursue, or the right to any vein beyond the exterior "boundary line of said Summit Quartz Mine extended "downward vertically, in this: That the evidence shows "that the end lines of said Summit Quartz Mine were not "parallel, and that said patent was issued under the laws "of the United States, adopted May 10, 1872, to-wit: 'An "'act to promote the development of the Mining Resources "'of the United States,' which act required that the end "lines should parallel." (Printed Transcript, page 77.)

And objection III:

"The evidence is insufficient to justify the finding that "the patent to the Summit Quartz Mine was issued in "pursuance of and in conformity with the Revised Stat-

"utes of the United States, Title 32, Chapter VI, in this: "That the evidence shows that the said patent to Hall "McAllister was issued under and in pursuance of the "act approved May 10, 1872, entitled: 'An Act to promote "'the development of the Mining Resources of the United "'States.'" (Printed Transcript, page 77.)

The foregoing objections do not amount to the assertion of a Federal question. Their full force and effect is that the findings of the Court, which are equivalent to the verdict of a jury, should have been different under the evidence. This Court will not review questions of fact.

Quimby v. *Boyd,* 128 U. S. 488;
Egan v. *Hart,* 165 U. S. 188, 192;
Dower v. *Richards,* 151 U. S. 658.

Any right possessed by plaintiff in error under the Act of 1872, was conditioned upon the fact that the Summit Mine was located thereunder. The court found the facts to be otherwise. "The judgment did not deny the validity of the statute, but the existence of the facts necessary to bring the case within the operation," said the court in *Crary* v. *Devlin,* 154 U. S. 619. The judgment in this case did not deny any right claimed by plaintiff in error, but at most found that the facts on which such right was claimed did not exist. Such a judgment is not reviewable on this writ.

Crary v. *Devlin, supra;*
Dower v. *Richards,* 151 U. S. 658.

Plaintiffs in error do not anywhere assert that their title to the vein in dispute rests upon the Act of 1872 nor that their title to the Toman Ranch rests upon that or any

other statute. In fact they attack the finding that their title is based upon agricultural patents on the ground:—

"That there is no evidence showing or tending to show "under what patents the defendants are the owners of the "Toman Ranch."

It may be true that plaintiffs in error's joinder of issue with defendant in error, so to speak, on the question of the latter's right under its patent, made necessary a construction of the Act of 1872, as to the rights to be accorded under that act to locators who had laid out their claims and applied for patent prior to the passage of that act, but such must be the inevitable result in all cases wherein one party asserts a right under a federal law and the other party refuses to concede the existence of the same.

In *Kizer* v. *Texarkana & Fort Smith Railway Company*, 179 U. S. 199, 200, the court said:—

"It is not every case where a federal statute has been "construed by a State court that gives a right of review to "this court, but the claim of any right, title, privilege or "immunity under the statute must have been denied by the "State tribunal. * * * That a federal statute was con- "strued unfavorably to one of the parties to the suit is no "ground for jurisdiction by this court, unless such con- "struction was not only unfavorable, but was against the "right, etc., specially set up and claimed under the statute. "In that case the party setting up and claiming the right "under the statute, which has been denied, can obtain a "review here. Thus it might happen, as it has happened "in this case, that, while the decision upon the construction "of the statute was unfavorable to the maintenance of the "cause of action set forth by the plaintiff in error, it was

"not against, but in favor of, the claim made under the "federal statute. The question * * * having been de- "cided in favor of the claim set up by defendant under the "statute, this court has no jurisdiction to review the judg- "ment."

Under this decision and the previously cited cases it seems clear that the record on appeal to the State Supreme Court discloses no question of federal cognizance.

It seems to be settled that the Supreme Court may, on writ of error, consider the opinion filed by the State court for the purpose of determining what questions were decided in that court.

Murdock v. *Memphis,* 20 Wall. 570;

Gross v. *United States Mortgage Co.,* 108 U. S. 477;

Adams County v. *Burlington & Missouri Ry. Co.,* 112 U. S. 123;

Philadelphia Fire Association v. *New York,* 119 U. S. 110;

Dibble v. *Bellingham Bay Co.,* 163 U. S. 63;

Mallett v. *North Carolina,* 181 U. S. 589;

Egan v. *Hart,* 165 U. S. 188;

San Jose Land & Water Co. v. *San Jose Ranch Co.,* 189 U. S. 177.

The following excerpts from the opinion of the State court sufficiently indicate the views of the court with relation to any possible federal question passed on.

"It will be seen from the foregoing that the mining "patent purported, upon its face, to grant to plaintiffs' "predecessors all that portion of the vein of ore which is "here in controversy. (Printed Transcript, page 87.)

"Defendants contend, however, that notwithstanding the

"attempted conveyance, in terms, of the property in dis-
"pute the patent failed to convey any extralateral right by
"reason of the fact that the end lines of plaintiffs' claim
"as located, surveyed, and granted, were not parallel as
"required by the Act of May 10, 1872.

"It appears to be recognized by the authorities that com-
"pliance with the Act of May 10, 1872, that the end lines
"shall be parallel, is essential to the existence of any right
"in the locator or patentee to follow his vein outside of
"the vertical planes down through the side lines in all
"cases where the location was made under such act (*Iron
"S. M. Co.* v. *Elgin M. & L. Co.*, 118 U. S. 196; *Del Monte
"M. & M. Co.* v. *Last Chance M. & M. Co.*, 171 U. S. 55;
"*Argonaut M. Co.* v. *Kennedy M. & M. Co.*, 131 Cal. 15,
"25)."

Again (printed Transcript, page 87) :—

"We are satisfied that, as the locations upon which the
"patent was based were made prior to May 10, 1872, the
"requirement as to parallelism of end lines was not appli-
"cable thereto. It was not until the passage of the Act of
"1872 that there was any such requirement. * * *"

Again (printed Transcript, page 89) :—

"The rights sought by the act to be preserved were such
"rights as had been acquired under the prior acts, by the
"making of a valid location, even though those rights were
"not of such a nature that the government might not, if
"it had seen fit to do so, deprive the locator thereof, and
"the right to obtain a patent in accordance therewith,
"under the provisions of the Act of 1872 was given for
"the reason that the previous laws as to the issuance of
"such patent, were repealed, and there was no other law
"under which a patent could be issued for any such mining
"claim. * * *"

Again (printed Transcript, page 90):—

"It is true that the patent recites on its face that it "is issued in pursuance of the Act of 1872, but it also "recites that it is issued in pursuance of the Act of July "26, 1866, and the Act amendatory thereof approved July "9, 1870, and in conjunction with the public records in "evidence, shows that it was issued upon locations made "prior to May 10, 1872, and upon an application pending "at that date."

The court also held, as previously outlined, that no rights were renounced by the patentee by accepting the added benefits accruing by virtue of the Act of 1872.

The foregoing language of the court shows that no other or different questions were presented to nor decided by the Supreme Court of the State of California, than were involved in the case as presented to the Superior Court of Amador County. The only federal right claimed in or decided by the Supreme Court was that claimed by defendant in error, and the only construction of a federal statute made, was rendered necessary because of defendant in error's claim of right thereunder.

The decision upon the question of renunciation of rights under one law by acceptance of added benefits under another is, we submit, a question of general law; a question of waiver or estoppel which is not one of the nature requisite to confer jurisdiction upon this court.

Gillis v. *Stinchfield,* 159 U. S. 658;
Beals v. *Cone,* 188 U. S. 186;
Speed v. *McCarthy,* 181 U. S. 269;

Eustis v. *Bolles,* 150 U. S. 361;
Beaupre v. *Noyes,* 138 U. S. 397.

Plaintiffs in error claimed the ore bodies in dispute by virtue of their ownership of the overlying surface of the Toman Ranch. Inasmuch as their agricultural patents excluded from the grant all veins of ore apexing outside the surface boundaries, their claim to the bodies in question was nothing more than the assertion of a common law right.

Now a common law right is not a matter of federal cognizance, but is a question for local decision. There is "no common law of the United States" separate and apart from that of the States.

Wheaton v. *Peters,* 8 Pet. 638, 657.

"When, therefore, a common law right is asserted, we must look to the State in which the controversy originated."

Id., 8 Pet. 657.

Nor does the fact that the common law right claimed is an incident of a federal grant of property within a State change the character of the question.

Packer v. *Bird,* 137 U. S. 661, at page 669, Mr. Justice Field in the opinion of the court said:—

"The courts of the United States will construe the grants "of the general government without reference to the rules "of construction adopted by the States for their grants; "but whatever incidents or rights attach to the ownership "of property conveyed by the government will be deter- "mined by the States, subject to the condition that their

"rules do not impair the efficacy of the grants or the use "or the enjoyment of the property by the grantee. As an "incident of such ownership the right of the riparian "owner, where the waters are above the influence of the "tide, will be limited according to the law of the State "either to low or high-water mark, or will extend to the "middle of the stream."

It seems clear from the record that there was not asserted by the plaintiffs in error below nor decided by the State court adversely to them any federal rights personal to the plaintiffs in error. They nowhere claimed that any federal statute or patent issued thereunder confirmed or conveyed to them the property in suit. It would seem that no construction of any federal statute could possibly vest in them title to property which their patent expressly excepts from the grant. The only federal statute which was construed, however, was not one under which plaintiffs in error claimed title, but was the Act of 1872 and especially the portions thereof which repealed the Act of 1866 but purported to preserve to existing locators the rights acquired by their locations. This was the act under which the patent of defendant in error finally issued and the construction thereof was rendered necessary by the assertion of right thereunder by defendant in error, and was favorable to the right thus asserted, hence cannot form the basis for a writ of error.

II.

BUT EVEN IF THERE WAS INVOLVED A QUESTION WHICH MIGHT HAVE BEEN MADE THE BASIS OF A WRIT OF ERROR PLAINTIFFS IN ERROR FAILED TO SET UP THE SAME WITH THAT DEGREE OF PARTICULARITY AND DEFINITENESS WHICH THE THIRD DIVISION OF SECTION 709, AS CONSTRUED BY THIS COURT, DEMANDS.

In *Spies* v. *Illinois*, 123 U. S. 131, 181, the court said:—

"To give us jurisdiction under Section 709 of the Re-
"vised Statutes because of the denial by a State court of
"any title, right, privilege or immunity claimed under the
"Constitution, or any treaty or statute of the United
"States, it must appear on the record that such title, right,
"privilege or immunity was 'specially set up or claimed'
"at the proper time in the proper way. To be reviewable
"here the decision must be against the right so *set up or*
"*claimed.* As the Supreme Court of the State was review-
"ing the decision of the trial court, it must appear that the
"claim was made in that court, because the Supreme Court
"was only authorized to review the judgment for errors
"committed there, and we can do no more."

And to the same effect:—

Brooks v. *Missouri*, 124 U. S. 394, 395;
French v. *Hopkins*, 124 U. S. 524;
Chappel v. *Bradshaw*, 124 U. S. 132, 134;
Baldwin v. *Kansas*, 129 U. S. 52, 57;
Texas Ry. Co. v. *Southern Pac. Co.*, 137 U. S. 48;

Leeper v. *Texas*, 139 U. S. 462;
Roby v. *Colehour*, 140 U. S. 153, 159;
Schuyler Nat'l Bank v. *Bollong*, 150 U. S. 85, 88;
Zadig v. *Baldwin*, 166 U. S. 486, 488.

"A definite issue as to the possession of the right must "be distinctly deducible from the record before the State "court can be held to have disposed of such federal ques- "tion by the decision."

Powell v. *Brunswick County*, 150 U. S. 400, 433;
Sayward v. *Denny*, 164 U. S. 454, 457;
Louisville & N. Rd. v. *Louisville*, 166 U. S. 709, 714, 715.

And in *Oxley Stave Co.* v. *Butler County*, 166 U. S. 649, 653, and 655:—

"The words 'specially set up or claimed' imply that if a "party intends to invoke for the protection of his rights "the Constitution of the United States, he must so declare; "and unless he does so declare 'specially,' that is, unmis- "takably, this court is without authority to re-examine "the final judgment of the State court. This statutory "requirement is not met if such declaration is so general "in its character that the purpose of the party to assert "a federal right is left to mere inference. It is the settled "doctrine of this court that the jurisdiction of the circuit "courts of the United States must appear affirmatievly "from the record, and that it is not sufficient that it may be "inferred argumentatively from the facts stated."

Keokuk & H. Bridge Co. v. *Illinois*, 175 U. S. 626.

And in *Kipley* v. *Illinois*, 170 U. S. 182, 186:—

"Our jurisdiction cannot arise in such case from infer-

"ence, but only from averments so distinct and positive "as to place it beyond question that the party bringing the "case up intended to assert a federal right."

In *Green Bay, etc., Canal Co.* v. *Patten Paper Co.*, 172 U. S. 66, 67, 68, the court said:—

"There is a class of cases wherein it has been held and "laid down as settled doctrine that 'the revisory power of " 'this court does not extend to rights denied by the final " 'judgment of the highest court of a State, unless the " 'party claiming such rights plainly and distinctly indi- " 'cated, before the State court disposed of the case, that " 'they were claimed under the Constitution, treaties or " 'statutes of the United States; that if a party intends to " 'invoke for the protection of his rights the Constitution " 'of the United States, or some treaty, statute, commission " 'or authority of the United States, he must so declare; " 'and unless he does so declare "specially," that is, un- " 'mistakably, this court is without authority to re-examine " 'the final judgment of the State court, that this statutory " 'requirement is not met if such declaration is so general " 'in its character that the purpose of the party to assert " 'a federal right is left to mere inference.' "

These cases speak in terms that cannot be misunderstood. The record must show that there was a direct issue made in the State court as to a federal right. The party asserting such right must have set forth his claim in such an unmistakable manner that the State court could not fail to observe that he relied upon such federal right.

What constitutes the record?

Clearly the record includes the pleadings in the cause, the judgment of the trial court and the bill of exceptions.

The decision in *Spies* v. *Illinois*, above quoted would

indicate that it includes nothing more; that the record of the case on appeal from the trial court is the *record* wherein the claim of federal right must be disclosed.

And in the late case of *Harding* v. *Illinois,* 196 U. S. 78, 84, Mr. Justice Day delivering the opinion of the court said: "We try the case upon the duly certified record "legally made in the State court, *and upon which its "decision rests."*

The decision must, in the nature of things, rest upon matters preceding it. A court cannot properly decide questions not involved in the pleadings nor in the proceedings had prior to rendition of judgment. A decision disposing of such questions would not "rest" upon the record in the case in the sense in which the court used that term in *Harding* v. *Illinois.*

In *Home For Incurables* v. *City of New York,* 187 U. S. 155, 157, Mr. Justice Harlan for the court said:—

"Later cases in this court have expressed the additional "thought that if the highest court of the State assumes "that the record sufficiently presents a question of federal "right and decides against the party claiming such right, "we will look no further and will proceed to a considera- "tion of that question, unless the decision is made to rest, "in part, upon some ground of local law, sufficient enough "in itself to sustain the judgment, independently of any "question of federal right."

The record must still show that the plaintiff in error asserted and intended to rely upon the matter of federal right which was considered by the court and decided against him.

In the late case of *Michigan Sugar Co.* v. *Michigan*, 185 U. S. 112, 113, 114, the court said:—

"The rule is firmly established, and has been frequently "reiterated, that the jurisdiction of this court to re- "examine the final judgment of a State court, under the "third division of Section 709, cannot arise from mere "inference, but only from averments so distinct and posi- "tive as to place it beyond question that the party bringing "the case here from such court intended to assert a federal "right. The statutory requirement is not met unless the "party unmistakably declares that he invokes for the pro- "tection of his rights, the Constitution, or some treaty, "statute, commission or authority, of the United States. "Applying this rule to the case before us, a writ of error "cannot be maintained."

And in *Chicago I. & L. Ry.* v. *McGuire*, 196 U. S. 128:—

"There are doubtless a few cases which hold that, where "the validity of a treaty or statute, or authority of the "United States is raised, and the decision is against it, or "the validity of a State statute is drawn in question, and "the decision is in favor of its validity, and the federal "question appears in the record and was decided, or such "decision was necessarily involved in the case, the fact "that it was not specifically set up and claimed is not "conclusive against a review of such question here. "*Columbia Water Power Co.* v. *Street R. Light & P. Co.*, "172 U. S. 475, 488, * * * But as the validity of no "statute, State or federal or authority thereunder, was "called in question here, this rule does not apply. The "true and rational rule stated by this court in *Bridge "Proprietors* v. *Hoboken Land & Improvement Co.*, 1 Wall. "116, 145. * * * is clearly applicable: 'that the court "'must be able to see clearly from the whole record that

"'a certain provision of the Constitution or Act of Con-
"'gress was relied upon by the party who brings the writ
"'of error, and that the right thus claimed by him was
"'denied.' This case is the not infrequent one of an
"attempt to clutch at the jurisdiction of this court as an
"afterthought, when all other resources of litigation have
"been exhausted."

In the petition to the State Supreme Court for writ of error to this court and in the assignment of errors accompanying the same, there is a wholesale assertion of federal rights claimed to have been set up in the State courts by petitioners and denied by the decisions. That neither petition nor assignment of errors forms any portion of the record on this writ is settled beyond question by the decisions of this court.

In *Warfield* v. *Chaffe*, 91 U. S. 690, 692, Mr. Chief Justice Waite said: "The petition for the allowance of the writ "in this court is not part of the record of the court below. "We act only upon that record."

And to the same effect are:—

Clarke v. *Pennsylvania*, 128 U. S. 394, 397;
Manning v. *French*, 133 U. S. 186, 192;
Butler v. *Gage*, 138 U. S. 52, 56;
Leeper v. *Texas*, 139 U. S. 462;
Sayward v. *Denny*, 158 U. S. 180;
Mutual Life Ins. Co. v. *McGrew*, 188 U. S. 308;
Chicago, etc., Ry. Co. v. *McGuire*, 196 U. S. 128, 132;
French v. *Taylor*, 26 Supreme Court Rept. 76, 78.

As to the assignment of errors, Mr. Chief Justice Fuller for the court in *Missouri Pac. Ry.* v. *Fitzgerald*, 160 U. S.

566, 578, said: "An assignment of errors cannot be availed "of to import questions into a cause which the record does "not show where raised and passed upon in the court "below."

And it was so held in:—

Ansbro v. *United States,* 159 U. S. 695, 697, 698;
Cornell v. *Green,* 163 U. S. 75, 80;
Chapin v. *Fye,* 179 U. S. 128, 130;
New York Central v. *New York,* 186 U. S. 269, 273;
French v. *Taylor,* supra.

Under any view of the authorities this writ of error should be dismissed.

The record of the proceedings prior to the decision in the State Supreme Court shows that plaintiff in error herein specially set up and claimed no right of the character enumerated in division three of Revised Statutes, Section 709. At most the record shows that they took issue with defendant in error upon the rights asserted by the latter under its patent, which, under the decisions of this court previously cited, is clearly insufficient to give this court jurisdiction.

The opinion of the State Supreme Court shows that no questions other than those presented in the record on appeal were deemed by that court to be before it for decision. That opinion, therefore, does not help the case for plaintiff in error.

The assignment of errors and the acompanying petition for the writ with the omnibus enumeration of rights under the Constitution and laws of the United States, asserted

therein, and claimed for the first time, comes too late to supplement the record.

We submit that, to use the language of this court, "this "case is the not infrequent one of an attempt to clutch at "the jurisdiction of this court as an afterthought when all "other resources of litigation have been exhausted."

Chicago, etc., Ry. v. *McGuire,* 196 U. S. 128.

We respectfully urge that the writ of error should be dismissed.

Respectfully submitted,

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Received copy of the foregoing motion and brief of 26 pages this 12th day of February, 1906.

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